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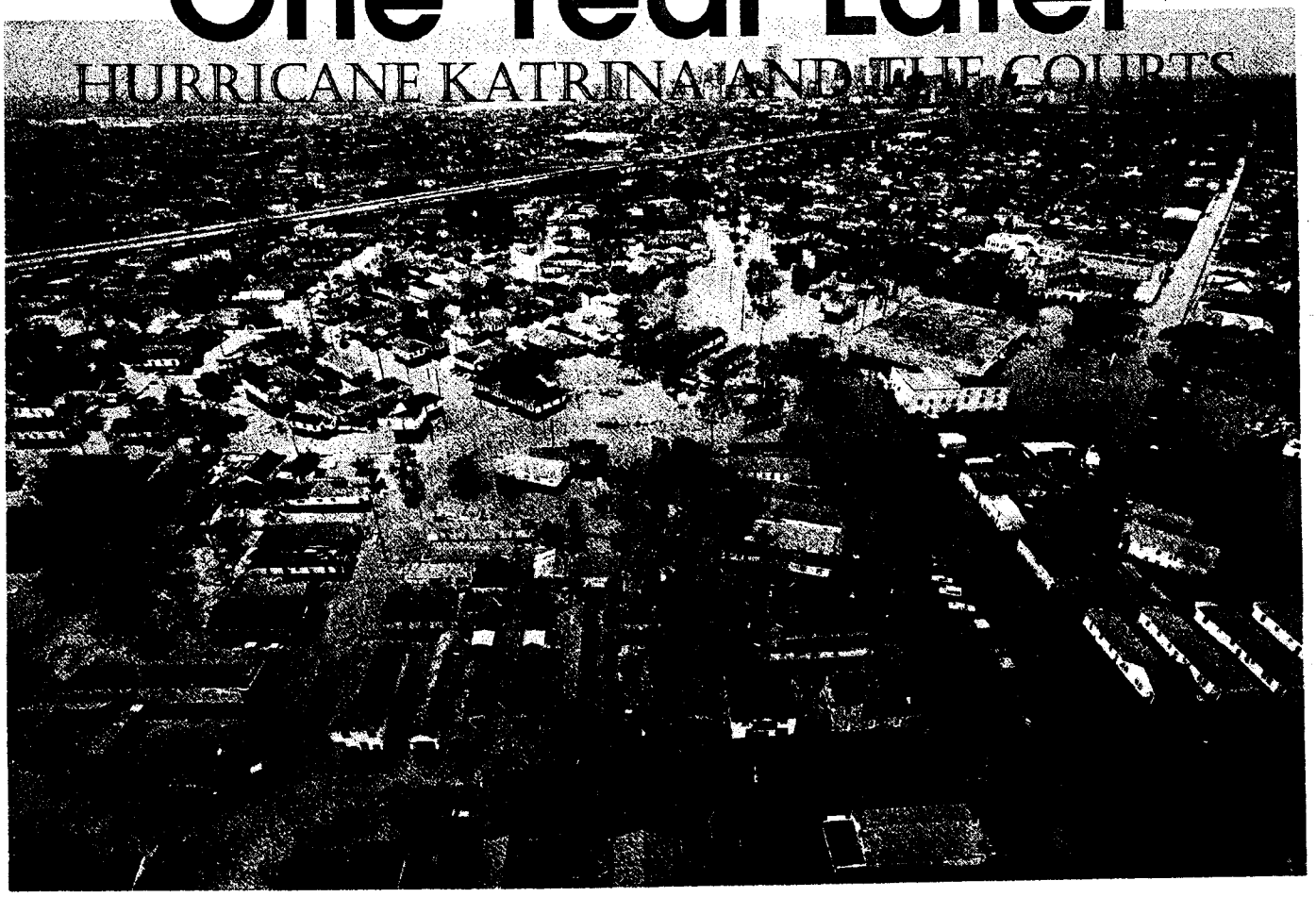
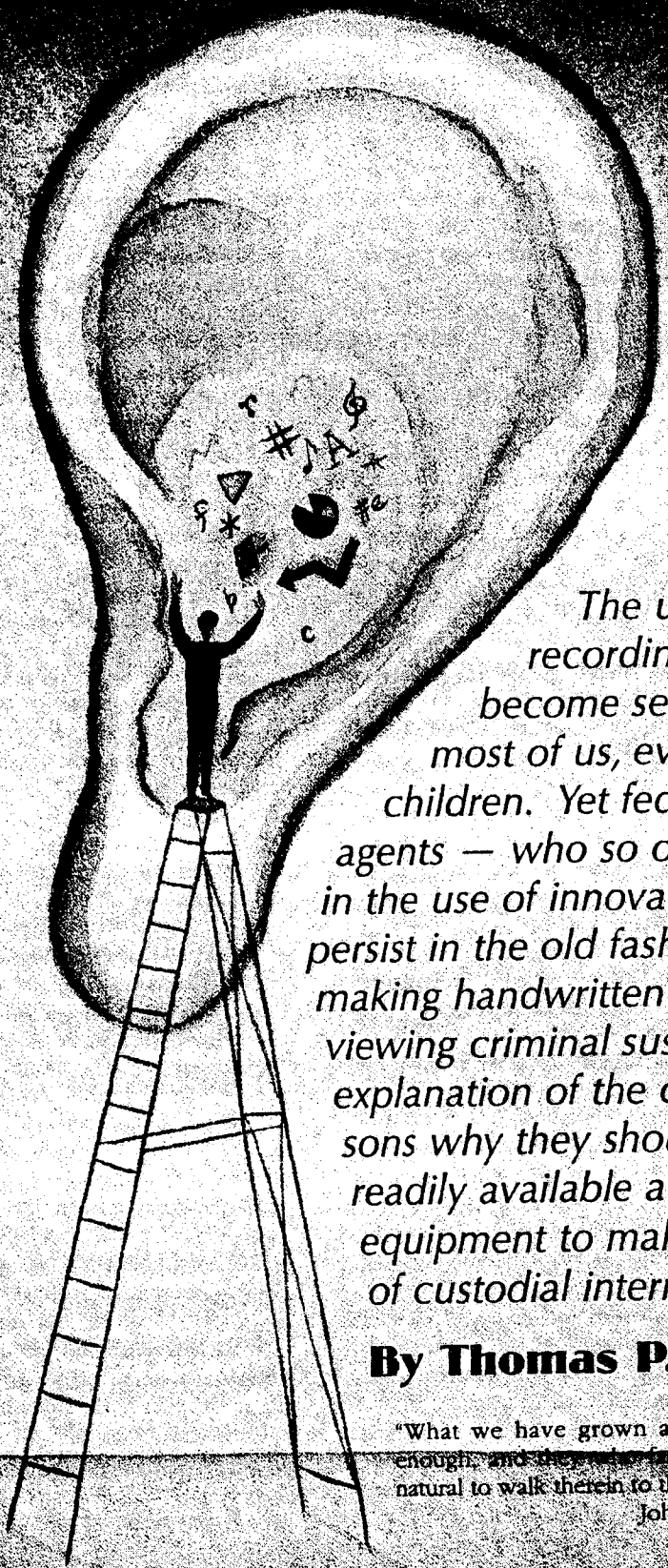
One Year Later

HURRICANE KATRINA AND THE COURTS



Federal Law Enforcement Should Record Custodial Interrogations



The use of electronic recording devices has become second nature to most of us, even grade school children. Yet federal investigatory agents — who so often lead the way in the use of innovative methods — persist in the old fashioned practice of making handwritten notes when interviewing criminal suspects. Here is an explanation of the compelling reasons why they should begin to use readily available audio and video equipment to make an exact record of custodial interrogations.

By Thomas P. Sullivan

"What we have grown accustomed to seems good enough, and they [illegible] and find it natural to walk therein to the end."

John L. Spalding, *Glimpses of Truth*

Our federal investigative agencies — for example, the Federal Bureau of Investigation; the Bureau of Alcohol, Tobacco and Firearms; the Drug Enforcement Administration; the Postal Inspection Service; the Internal Revenue Service; the Secret Service; and the Department of Homeland Security — have access to and routinely make use of the most up-to-date, sophisticated technology available. But, incredibly in this day and age, these agencies cling to the "scribble-then-type" method when questioning criminal suspects who have been arrested, rather than using readily available, highly efficient, and perfectly legal audio and video recorders, which they commonly use for other purposes. Indeed, the FBI retains a rule, adopted decades ago, that prohibits an investigating agent from recording custodial interviews without advance supervisory approval.

Explanations for this anomaly may well be habit, inertia, and resistance to change. As in so many aspects of our personal and professional lives, we tend to persist in using practices we used early on for years after they should have been scrapped for newer and better methods.

My associates and I spoke with hundreds of law enforcement agencies in small, medium, and large communities throughout the United States, who unlike their federal counterparts, routinely electronically record custodial interviews. Experienced detectives provide ringing endorsements of the many benefits of electronic recording. State legislatures and courts are beginning to mandate the practice. Yet the federal law enforcement community, which so often provides leadership in investigating and solving crimes, remains far behind in this area. This article explains why the time has come for the federal agencies to begin recording custodial interviews.

What's the Problem?

At the outset it is necessary to put the problem into perspective with a brief explanation of courtroom controversies that repeatedly take place in federal and state courts:

- Suspects are taken into custody in felony investigations and are questioned by law enforcement officers — federal agents or police and sheriff's detectives — and some suspects are indicted.
- Prosecutors serve notice that, at trial, they will offer evidence of what was said or done during the interrogation.
- The defense counters by disputing whether the suspects — now defendants — received proper *Miranda* warnings during their interrogation, whether the questioning continued after the defendants' request to speak with counsel, whether improper tactics were used to elicit incriminating statements, and/or whether the officers or agents misstated or distorted what the defendants said or did.

Each year an enormous amount of law enforcement, prosecutorial, defense, and judicial time is spent resolving these recurring controversies. If a pretrial motion to suppress the statement is made, the trial judge must hear the testimony and determine where the truth lies. If the judge rules that the unrecorded statement is admissible, the defendant is permitted to present the very same issue to the trial jury. If the prosecution's version is accepted and a guilty verdict is returned, the question often constitutes grounds for appeal, and the reviewing court must then struggle with the opposing versions of what occurred during the closed-door session. If the appellate court accepts the defense version, the defendant may have a basis for a civil damage action, in which the contradictory evidence as to what occurred during the custodial interview will be litigated once again.

Electronic recordings — actually, instant replay in the courtroom — can put an end to virtually all of these controversies.

Federal Judicial Criticisms of Investigative Agencies for Not Recording Custodial Interviews

Federal judges are well aware that federal law enforcement agents are adept at using electronic investigating devices in their most sensitive investigations, but that these same agencies have not imposed a requirement that their custodial interviews be recorded. This state of affairs leads inevitably to the kinds of disputes described above. District court judges have begun to make their displeasure known to agents in both federal and local law enforcement agencies.

In 1999, District Judge Charles B. Kornmann in South Dakota, frustrated by FBI agents' repeated failure to record custodial interviews, wrote, "This is another all too familiar case in which the F.B.I. agent testifies to one version of what was said and when it was said and the defendant testifies to an opposite version or versions. Despite numerous polite suggestions to the F.B.I., they continue to refuse to tape record or video tape interviews. This results, as it has in this case, in the use, or more correctly, the abuse of judicial time. ..." Judge Kornmann ruled that if, in future cases, defendants' unrecorded statements were offered into evidence but were "not tape or video recorded and there is no good reason why the taping or recording was not done and there is disagreement over what was said, this [c]ourt intends to advise juries of exactly what is set forth in this Order and explain to the jury that F.B.I. agents continue to refuse to follow the suggestions of [the district judges] and why, in the opinion of the court, they refuse to follow such suggestions." *United States v. Azure,* No. CR 99-30077, 1999 WL 33218402, at *1 (D.S.D. Oct. 19, 1999).

A year later, Chief Judge Mark W. Bennett of the Northern District of Iowa directed his criticism at all federal law enforcement agencies for their failure to record custodial statements: "Resolution of this factual conflict, indeed the entirety of the motion to suppress, would be unnecessary if the officers had videotaped or otherwise recorded their interaction with the defendant. ... The continued failure of federal law enforcement agencies to adopt a policy of videotaping or otherwise recording interviews leads invariably to the proliferation of motions such as the one cur-

rently pending before the court." He directed the following especially harsh words at DEA agents: "There is simply no good reason why DEA agents could not make audio or video recordings of virtually all interrogations that occur ... [L]eft with no rational explanation for the DEA's policy against videotaping or recording of interrogations, the court is left with the inescapable conclusion that DEA's offered reason for not videotaping or recording statements is totally pretextual." *United States v. Plummer*, 118 F. Supp. 2d 945, 946–949 (N.D. Iowa 2000).

And recently, District Judge Avern Cohn of the Eastern District of Michigan granted a defense motion to suppress a statement the defendant had made at a custodial interview based on a finding that *Miranda* warnings were not given and stated the following: "Affording the [c]ourt the benefit of watching or listening to a videotaped or audiotaped statement is invaluable, indeed, a tape-recorded interrogation allows the [c]ourt to more accurately assess whether a statement was given knowingly, voluntarily and intelligently." *United States v. Lewis*, 355 F. Supp. 2d 870, 873 (E.D. Mich. 2005).

District Judge Stephen P. Friot from the Western District of Oklahoma wrote to me that he finds it "ironic that if the cost of repairing a car is at stake in a civil case, the defendant's account of the matter (i.e., his deposition) is meticulously recorded, but agencies with ample opportunity and resources to do so fail to record statements where liberty or perhaps even life are at stake."

In *Giles v. Wolfenbarger*, No. 03-74073, 2006 WL 176426, at *4 (E.D. Mich. 2006), District Judge Arthur J. Tarnow, in the course of granting a writ of habeas corpus to a defendant convicted in a state court, ruled that the prosecution's argument that the defendant's custodial statements were voluntary was "weakened by the lack of an audio or video record."

District Judge William C. Lee in the Northern District of Indiana told a local police officer-witness: "If you've got audio and videotape there, I think you ought to use it. I don't know why I have to sit here and sort through the credibility of what was said in these interviews when there's a perfect device available to resolve that and eliminate any discussion about it." He added, "We shouldn't be taking up the federal court's time of an hour and a half this morning and couple of hours in the other case trying to figure out who said what to whom when in these interviews because there's no videotape of them." *United States v. Bland*, No. 1:02-CR-93 (N.D. Ind. Dec. 13, 2002).

Federal investigative agencies can avoid these judicial tongue lashings when they adopt electronic recording procedures, which are clearly in their own best interests.

Increased Support for Custodial Recordings

During the past few years, the many virtues of electronically recording custodial interrogations have become known to the personnel who command state and local police and sheriff's departments, to the prosecutors with whom they work, and to lawmakers and courts across the country. As a result of statutes and court rulings in several jurisdictions, custodial recordings are now done for a variety of circumstances in Alaska, Illinois, Maine, Massachusetts, Minnesota, New Jersey, New Mexico, Wisconsin, and the District of Columbia.[1] Some of these mandates provide evidentiary consequences for unexcused failures to record, while others require cautionary jury instructions.

In order to learn the experiences of police and sheriffs who have voluntarily undertaken to record custodial interviews, we contacted more than 400 law enforcement officers in 36 other states who, without legislative or judicial compulsion, record interviews in major felony investigations. Without exception, they have described their support for recording from the *Miranda* warnings to the very end. Some officers had initial misgivings, but we have yet to speak to an officer who has experience with recording who is opposed to the practice or who would prefer to return to nonrecorded interviews. Electronic replay is the best way to avoid the expensive, time-consuming hearings described above; when the recordings are played for the judge or jury, there's no room left for argument on either side.

The various benefits that recordings bring to investigating and solving crimes have been expressed over and over again. Examples include the following:

- Electronic recordings of custodial interviews allow detectives to concentrate on what is being said and done without the distraction of note taking.
- They permit fellow officers to observe interviews by remote hookups and to make real-time suggestions for areas and methods of questioning.
- They prevent the use of unlawful or abusive conduct.
- During later viewing, recordings disclose indications of innocence as well as previously overlooked inconsistencies and body language suggesting evasion and guilt.
- They eliminate virtually all pretrial and trial arguments about what occurred during the interviews.
- In the few cases that present the question, the recordings avoid the need for the participants to try to recall and recount in testimony what occurred when testifying weeks or months later.
- They lead to more clearances, guilty pleas, and convictions.
- They provide a powerful training device for new as well as experienced investigators.
- Recorded statements engender public confidence and respect for local law enforcement.

Experienced detectives from all over the United States have expressed such endorsements of the practice of electronically recording custodial interviews with boring consistency.[2]

To summarize, officers who have given recordings a fair try are strong advocates of the practice. Among those we've interviewed in more than 475 police and sheriff's departments in 44 states, we did not find a single officer who, given the choice, would revert to scribble-then-type method of documenting interviews in important felony investigations. And we continue to receive positive comments about the practice.

Attorneys on both sides of criminal cases also endorse electronic recording of custodial interviews. Defense lawyers favor recordings, because truthful exculpatory responses carry great weight and afford suspects protection from improper police conduct during interviews and from later distortion of suspects' words and actions. Prosecutors support recordings for a variety of reasons, including the following:

- They facilitate identification of innocent as well as guilty suspects.
- Recordings make motions to suppress statements made during custodial interviews a thing of the past.
- Confessions and admissions in electronic form provide powerful evidence that leads to clearance of cases and to guilty pleas.
- In cases that go to trial, the prosecution's evidence is far more persuasive when presented in the form of a recording rather than detectives' testimony based on recollection, notes, or typed reports.

As a result of electronic recording, law enforcement becomes more accurate, sure, swift, and economical.

Judges concur with these evaluations. Trial court judges are no longer called upon to listen to disputed evidence about what took place during unrecorded closed-door interviews. Many reviewing court judges have encouraged the practice of recording custodial interviews for years.[3]

Misconceptions of Those Who Have Not Tried Recording

Federal and state law enforcement personnel who have not given custodial recordings a try often voice a number of concerns and anticipated problems. Three of the usual misconceptions and a newly encountered one are discussed below.

Recordings Will Cost Too Much

Few of those with whom we have spoken have mentioned cost as a problem, and none would abandon the practice because of funds needed for equipment, storage, typing, and the like. Many departments located in small communities use inexpensive audio equipment — handheld tape recorders, for example — because of the infrequent need for recording and lack of video capacity. Larger departments with frequent custodial interrogations often adopt digital video technology, which requires less storage space. But regardless of the size of the department, most costs come on the front end while the savings continue, avoiding the time and expense involved in motions to suppress, going to trial, defending appeals after contested convictions, and precluding post-conviction claims about coerced confessions and the risk of money judgments in civil damage suits. The net result is that the savings outweigh the cost required.

Suspects Will Clam Up

Some agencies that have not tried recording custodial interviews speculate that most suspects will refuse to cooperate if they are aware the interview is to be recorded. Detectives who are experienced with recordings have repeatedly told us that this is usually not a problem: people are used to being recorded in their ordinary lives, and recordings can be presented as the suspects' opportunity to explain their version of events without police manipulation or later distortion. Furthermore, suspects' awareness that they are being recorded should not normally present a problem for federal law enforcement agencies, because Congress has authorized these agencies to record interrogations surreptitiously.[4] In any event, if a suspect realizes that a recording is to be made and declines to proceed or is reluctant to do so, the routine response of the detectives with whom we have spoken is to make a record of the circumstances, turn the recording equipment off, and proceed with the interview using handwritten notes. This relatively rare event is consistent with the statutes and court rulings referred to above and provides the complete solution to the concern that the suspect will clam up.

Judges and Juries Will Disapprove of Our Tactics

Another concern voiced by agencies that do not record interrogations is that judges and juries may reject recorded admissions or confessions, because they disapprove of certain interrogation tactics that will be disclosed — for example, shouting, using street talk and profanity, sympathizing with suspects, blaming victims, and lying about the incriminating nature of the evidence that has been collected. Few of the detectives with whom we have spoken have mentioned this as a problem, and those who consider it a problem say that when jurors are informed that these tactics are legally permissible, they accept the recorded evidence. It should go without saying that, if the recorded tactics are outside the law, the officers justifiably risk suppression of the suspect's statement; and we have been told that the presence of recording tends to make detectives more careful and more professional in the way they conduct themselves during custodial interviews.[5]

Requiring Us to Record an Interview Is an Unwarranted Slap at Our Integrity

I have recently heard a concern that requiring federal agents to record custodial interviews is an implicit rejection of their well-earned reputations for honesty and, at its core, implies that their testimony about events that have not been recorded may be fabricated. During our many calls to various officers, many have mentioned that judges and juries are aware of the ready availability and common usage of recording equipment and have cited failure to record custodial interviews as a basis for questioning or rejecting law enforcement agencies' unrecorded versions of what occurred. These comments were not made to us as reasons to avoid recordings but, rather, to explain why recordings foster public confidence, precluding controversy about what occurred behind closed station house doors and at the same time demonstrating that law enforcement agencies have nothing to hide when questioning suspects in private.

Federal investigative agents, no matter how experi-

perience tell us that recordings provide more accurate, descriptive, and complete evidence than testimony as to what occurred provides. No one can precisely reproduce the words, inflections, and mannerisms of the participants in past conversations, and this task is especially difficult in the kind of give-and-take situations that often characterize confrontational interviews with suspects and becomes even more problematic months or years after the events have taken place.

Electronic recordings are not only far superior to testimonial efforts at recounting what occurred, they also preclude hostile cross examinations, which, owing to the frailty of memory and expression, can occasionally reveal inaccuracies and inconsistencies in even the best agents' testimony.

Conclusion

Most professionals in the justice system, including those who serve as judges and jurors, use recording equipment to memorialize special family events, trips, and the like. It is clear that, in light of the controlled conditions that are available, electronic recordings can be made of almost all custodial interviews, removing room for disagreement as to what occurred. The opinions presented in this article show that federal law enforcement agencies are not immune to negative judicial reactions when the prosecution relies on unrecorded custodial confessions or admissions. This is also the case with jurors in federal criminal cases; and, through cross-examinations and during closing arguments, defense lawyers commonly urge them to ask, "Where is the recording?" This is not an unreasonable question, because federal agents usually are able to record custodial interviews with ease and without the suspects' knowledge.[6]

More than 30 years ago, Senior District Judge Van Pelt explained why recordings are, and remain, preferable, stating,

> We must recognize that the capacity of persons to observe, remember and relate varies as does their ability and desire to relate truly. For jurors to see as well as hear the events surrounding an alleged confession or incriminating statement is a forward step in the search for the truth. And after all, the end for which we strive in all trials is "that the truth may be ascertained and the proceedings justly determined."[7]

Recording all custodial interrogations — from the *Miranda* warning to the end of the session — will increase the accuracy and fairness of our federal criminal justice systems. The talented personnel in our federal investigative agencies should waste no time in taking advantage of the multiple benefits to be obtained from electronically recording their custodial interviews. **TFL**

Thomas P. Sullivan, an attorney with Jenner & Block in Chicago, was U.S. attorney for the Northern District of Illinois (1977–1981), and co-chair of the Illinois Governor's Commission on Capital Punishment (2000–2002), and is current chair of the Illinois General Assembly's Capital Punishment Reform Study Committee. He thanks Andrew W. Vail, Howard W. Anderson III, and Jacqueline Shiff for their assistance in the preparation of the article.

Endnotes

[1]705 ILL. COMP. STAT. ANN. § 405/5-401.5 (West Supp. 2006); 705 ILL. COMP. STAT. ANN. §§ 5/103-2.1, 5/14-3(k) (West Supp. 2006); ME. REV. STAT. ANN. tit. 20 § 2803-B(1)(K) (2004); N.M. STAT. ANN. § 29-1-16 (West 2006); WIS. STAT. ANN. §§ 968.073, 972.115 (West 2006); D.C. CODE §§ 5-116.01 to 03 (2005). *Stephan v. State*, 711 P.2d 1156, 1162 (Alaska 1985); *Commonwealth v. DiGiambattista*, 813 N.E.2d 516 (Mass. 2004); *State v. Scales*, 518 N.W.2d 587, 591 (Minn. 1994); N.J. SUP. CT. R. 317 (2005). *See also State v. Barnett*, 789 A.2d 629, 632-33 (N.H. 2002) (although not requiring electronic recordings, holding that no part of a defendant's recorded statement may be admitted into evidence unless the entire interview was recorded).

[2]The many reasons law enforcement officers favor recordings are explained in detail in my articles, *Police Experiences with Regarding Custodial Interrogations*, SPECIAL REP. (Nw. Univ. Sch. of Law Ctr. on Wrongful Convictions) 10–13 (2004), available at www.jenner.com/policestudy; *Recording Custodial Interrogations: The Police Experience*, 52 FED. LAWYER 20–24 (Jan. 2005); *Recording Custodial Interrogations*, 53 LAW AND ORDER 46 (Mar. 2005); *Commentary, Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. OF CRIM. L. & CRIMINOLOGY 1127, 1129–1130 (2005); and *Electronic Recording of Custodial Interrogations*, 19 THE CHIEF OF POLICE 17 (Nov.–Dec. 2005).

[3]Cases are collected in 95 J. CRIM. L. AND CRIMINOLOGY, *supra* note 2, at 1130.

[4]18 U.S.C. § 2511(2)(c) (2005).

[5]This is not a concern for honorable law enforcement witnesses, because, if asked under oath, they may not lawfully alter or omit relevant facts, including candid explanations of tactics used to obtain confessions and admissions, whether or not the interviews were recorded.

[6]In February 2005, following the acquittal of a defendant in the District Court in Philadelphia for making false statements to FBI agents, a juror explained, "We didn't know with certainty exactly what was asked. My advice to the FBI would be to tape their interviews." The FBI's failure to record a lengthy interview of Terry Nichols was cited by jurors in the Western District of Oklahoma as a reason for declining to impose the death penalty. *U.S. v. McVeigh*, No. 96-CR-68-M (D. Colo. 1997). David B. Caruso, *FBI Policy Against Taping Interviews Key in Acquittal*, PITTSBURGH POST-GAZETTE, Feb. 6, 2005, at B-1. Following a defendent's recent acquittal of a count for making a false statement to FBI agents (18 U.S.C. § 1001), the Chicago federal prosecutor stated that the jury would have convicted if the session had been recorded. Natasha Korecki, CHICAGO SUN-TIMES, July 17, 2006, at 10.

[7]*Hendricks v. Swenson*, 456 F.2d 503, 507 (8th Cir. 1972).